DATE: JULY 16, 1997
CASE NO. 95-INA-417

In the Matter of:

SUMMIT USA LAND DEVELOPMENT
Employer

On Behalf of:

ANTONIO GOMEZ PRATA
Alien

APPEARANCE: Luis A. Gonzalez, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On January 19, 1994, the Employer, Summit USA Land Development, Inc., filed an application for labor certification to enable the Alien, Antonio Gomez Prata, to fill the position of "Concrete Finisher," which the local Job Service classified as "Cement Mason." The job duties for the position, as state on the application, are as follows:

> Smooths and finishes surfaces of poured concrete floors, walls, sidewalks or curbs to specified textures, using handtools or power tools; Level concrete to specified depth and workable consistency; Removes rough or defective spots.

(AF 29).

The stated requirements for the position are: four years of experience in the job offered; verifiable and good references; ability to speak and write Spanish and English; a driver's license; experience directing subgrade work, mixing of concrete, and setting of forms; and, working experience doing home driveways and concrete terraces (AF 29).

The CO issued a Notice of Findings on December 2, 1994, proposing to deny certification on the grounds that the Employer failed to establish the business necessity for the Spanish language requirement (AF 20-23).

The Employer submitted its rebuttal on or about January 5, 1995 (AF 10-19). The CO found the rebuttal unpersuasive and issued a Final Determination on February 17, 1995, denying certification on the same grounds (AF 7-9).

On April 21, 1995, the Employer requested a review of the denial of certification (AF 1-6). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification and Appeals for review. The Employer's brief has been received and considered.

Discussion

Section 656.21(b)(2)(I)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity.

The business standard of Information Industries, 88-INA-82 (Feb. 9, 1989)(en banc) is applicable to a foreign language requirement. See Coker's Pedigreed Seed Co., 88-INA-48 (Apr. 19, 1989)(en banc). To establish the business necessity of a foreign language requirement, an employer must show that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) the requirement is essential to performing, in a

reasonable manner, the job duties as described by the employer. *See, Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) *(en banc)*.

In the Notice of Findings, the CO directed the Employer to establish the business necessity for the foreign language requirement by submitting evidence that the Spanish language requirement arises from business necessity and is not simply a matter of the Employer's convenience. Specifically, the CO directed the Employer to submit the following rebuttal evidence:

1. The total number of clients/people dealt with, and the percentage of those people dealt with who cannot communicate in English.

2. The percentage of business that is dependent upon the Spanish language.

3. How absence of the language would adversely impact business.

4. The percentage of time worker would use the language.

5. How employer has dealt with and handled Spanish speaking clients previously or is currently handling this segment of business.

6. How services ares provided by employer to other ethnic groups and how the language problem is handled.

7. Any other documentation which will clearly show that fluency in Spanish is essential to employer's business.

8. The total number of employees to be supervised and the number of those employees who are unable to communicate in the English language.

9. Documentary evidence showing that the employees to be supervised do not speak English. (Example: copies of notices, such as health benefits information, OSHA, etc.) issued to employees in the foreign language during the ordinary course of business and <u>which predate the filing of this application</u>. Please note that a list of foreign surnames alone does not constitute evidence of business necessity.

10. The percentage of time (in relation to the total job duties) that the supervisor will communicate with the employees in the Spanish language.

11. Has the employer previously employed workers who do not speak English? If yes, how were these employees supervised?

12. Evidence that alternatives (to hiring a Spanish speaking supervisor) have been pursued to enable communication to take place between supervisors and

employees.

13. Any other documentation which will clearly show that fluency in (Spanish) is essential to employer's business.

(AF 21-22).

The Employer's rebuttal consists of a cover letter, dated January 5, 1995, by its attorney (AF 10-13), a letter, dated January 5, 1995, signed by Thomas J. Knight, Vice-President (AF 14-16), a list of 29 names which apparently are those of various employees (AF 17), and statements by Jose I. Reyes, a pipe layer for Employer, and Manual B. Vilaca, Employer's President, which represent that they are both fluent in Spanish and English, and that they help translate, explain, and communicate all notices, health benefits information, job duties, special assignments, and any other important messages to the company's work force, of which sixty percent are Hispanic, who do not understand or speak English (AF 18,19).

Of the foregoing, the Employer's primary attempt to document the information sought by the CO is contained in Mr. Knight's letter. In summary, Mr. Knight stated the following: 60% of the work force speak little or no English; the crew of six to eight cement masons is 100% Hispanic, who have "limited or no understanding of the English language;" these workers speak Spanish 100% of the time; Employer "cannot assume the risk of having someone in this position without the ability to communicate with the other workers;" "(b)ased on past experience we have noticed that English speaking workers do not have the necessary skills or the willingness to perform the job duties;" this business segment is dominated by Spanish-speaking workers, especially in the Northern Virginia and Washington, D.C. areas; ineffective communications can have a detrimental effect and result in big mistakes or defects which can transform a 10% profit in a project to a 20-40% loss. Regarding the Spanish-language notices and other documentary evidence sought by the CO, Mr. Knight stated: "We are fortunate to have a corporate official, Manual Vilaca, and an employee, Jose I. Reyes, who are completely fluent in Spanish and English. They have been assisting the company in communicating and translating to all the Spanish speaking workers all notices, health benefit information, special assignments, work schedules, time scheduling and any other important matter (sic) so that (the) job can be performed in a timely manner. They act as liaison between the workers and management." (AF 14-16).

In the Final Determination, the CO stated, in pertinent part:

> In response to your rebuttal, you have not provided any information or evidence that would show why the employer needs to hire a cement mason who is fluent in Spanish. There are no supervisory responsibilities associated with this position which would require him to speak directly with other workers, and, if the supervisors are bi-lingual, there would be no reason for conflicts or misunderstandings that would jeopardize the customer's final product. Nor would there be any extreme financial loss suffered because the individual did not speak Spanish.

> The job duties to be performed as outlined on the ETA 750 Part A, Item 13, are as follows:
>
> Smooths and finishes surfaces of poured concrete floors, walls, sidewalks or curbs to specified textures, using hand tools or power tools; Level concrete to specified depth and workable consistency; Removes rough or defective spots.
> Additionally, you were requested to submit documentary evidence showing that the employees do not speak English. The Notice also advised that a list of foreign surnames alone would not constitute evidence of business necessity. However, you have not provided any evidence other than a listing of the employees' names to document the language requirement. You also have not provided all of the information requested in the Notice, nor have you addressed why you have not provided all the information.

(AF 9).

We have long held that an employer must provide directly relevant and reasonably obtainable documentation sought by the CO. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc). In the present case, as outlined above, the CO made a reasonable request of the Employer to provide such documentation. Nevertheless, the Employer failed to adequately comply with the CO's request. In fact, the Employer's "rebuttal" suggests that the reason no Spanish-language notices were provided is because they do not exist. Specifically, Employer's own rebuttal statement indicates that, not including the Alien, two of its employees translate such notices to the Spanish-speaking workers. Accordingly, Spanish-language notices apparently are not necessary. Furthermore, we note that the Employer failed to provide any documentation to support its contention that Spanish language fluency arises from business necessity, as requested in the NOF. Moreover, we are deeply concerned by the Employer's apparent bias against English-speaking workers, as reflected in Mr. Knight's assertion that past experience demonstrates that English speaking workers lack the necessary skills or willingness to perform the job duties (AF 14).

Finally, we note that after the Final Determination was issued, Employer's counsel requested reconsideration and stated, in pertinent part, that the CO erred by finding that the job opportunity does not entail supervisory responsibilities. Specifically, Employer's counsel referred to the ETA 750 Part A, Item 15, which includes "(e)xperience directing subgrade work" among various other special requirements (AF 4-6, 29).

We find Employer's argument unpersuasive. As found by the CO, our review of the application for labor certification reveals no supervisory duties. Furthermore, the ETA 750 Part A, Item 17, specifically states that the number of employees the Alien will supervise is "0" (AF 29). Accordingly, if there was error on the part of the CO, it was his failure to also challenge the unduly restrictive requirement of experience directing subgrade work.

In summary, we find that although the Employer has an obvious preference for someone who speaks Spanish, it has failed to adequately document the business necessity for the Spanish language requirement. Accordingly, we agree with the CO's determination that the Employer has

not satisfactorily rebutted this issue, and also conclude that the application for certification should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.